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No. 88-

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD JACKSON,
Petitioner,

vs.

ST. JOSEPH STATE HOSPITAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SAMUEL I. MCHENRY
RICHARD F. HALLIBURTON
(*Counsel of Record*)
Legal Aid of Western Missouri
600 Lathrop Building
1005 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750
Attorneys for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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QUESTION PRESENTED

Should employers be allowed to discharge Title VII complainants for complaint associated activity which the employer finds objectionable on a purely subjective basis?

LIST OF ALL PARTIES

1. Petitioner, who was plaintiff and appellant below, is Richard Jackson, former employee of Respondent.

2. Respondent, who was defendant and appellee below, is St. Joseph State Hospital.

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OPINION BELOW

The opinion sought to be reviewed is found at *Jackson v. St. Joseph State Hospital,* 840 F.2d 1387 (8th Cir. 1988).

GROUNDS FOR JURISDICTION

The date of the opinion/judgment of the United States Court of Appeals for the Eighth Circuit of which this petition seeks review is March 1, 1988.

On the 23rd of May, 1988, petitioner's timely Petition for Rehearing en banc was denied.

The statutory authority for this court to review the judgment by way of Petition for Writ of Certiorari is found at 28 U.S.C. § 1254(1).

STATUTORY PROVISION

42 U.S.C.S. § 2000e-3. OTHER UNLAWFUL EMPLOYMENT PRACTICES

a) *Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding or hearing.* It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee, controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§ 2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§ 2000e-17].

STATEMENT OF THE CASE

Petitioner Jackson is an adult male initially employed by the St. Joseph Hospital as its chief accountant on the 15th of May, 1975. Jackson, following a long military career, had been hired as chief accountant largely to correct his predecessor's inability to prepare medicare cost

reports. Following Jackson's arrival as chief accountant at the hospital the accounting department improved significantly and the medicare/medicaid cost reports became both regular and accurate. However, along with the improvements came criticism and complaints from those who worked under his supervision.

In January of 1982 a female accountant (Roxanne Kuhn) who worked under petitioner's supervision filed an internal complaint against petitioner alleging "Harassment". On that same date, Jackson suggested that the accountant be suspended for one day with pay for failing to complete certain assignments. The hospital superintendent met individually with the accountant and Jackson and urged that they attempt to restore working harmony. The accountant thereafter withdrew her complaint subject to its being reinstated "if further incidents occurred" and Jackson withdrew his request for disciplinary action against her.

On the 4th of June, 1982 Jackson sought out this same accounting employee in order to discuss some accounting assignments. After being unable to find her in her office, petitioner found her in the office of another accountant (Rhonda Mahoney). He placed his hand on Ms. Kuhn's shoulder in order to get her attention, as she was sitting with her back to him as he entered the room. Following an exchange of words between Kuhn and petitioner, Kuhn returned to her office. On the 9th of June, 1982, Jackson called Kuhn into his office and inquired about her use of alcohol. On the 10th of June, 1982, accountant Kuhn complained to the hospital of the "incidents" (which she did not term "sexual harassment") on the 4th and 9th of June.

On the 14th of July, 1982, Jackson was reprimanded for "a severe lack of judgment and tact" and directed not to:

a. place his hands on female employees;

b. make inquiries into employees' private lives nor engage in gossip regarding employees;

c. conduct counseling or disciplinary sessions with female employees without a witness present.

On the 30th of July, 1982, Jackson filed an internal complaint alleging sexual discrimination with regard to the July 14th reprimand. On the 17th of November, 1982, Jackson followed his internal complaint with a complaint filed with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR) regarding the early June incidents with Ms. Kuhn and his subsequent reprimand.

On January 10, 1983, Jackson was notified by the EEOC of a fact finding conference scheduled for the 27th of January, 1983. An EEOC fact finding conference involves a conference among the parties at the EEOC office where each party is allowed to present their respective evidence, "Facts", for the investigator's consideration.

Petitioner Jackson, who was not represented by an attorney, began to prepare for the conference in part by attempting to gather statements to prove that his confrontation with Ms. Kuhn had not been sexual in nature and that thus there was no justification for the reprimand, which obviously assumed that there were sexual connotations in the June 4 incident. During this same

period the hospital was gathering evidence and statements to support their position at the EEOC conference.

After being informed that Kuhn did not intend to appear at the fact finding conference,[1] Jackson attempted to get a statement from the accountant in whose office he discovered Ms. Kuhn on the 4th of June, Ms. Mahoney.

On the 24th of January, 1983, Jackson first approached Ms. Mahoney requesting that she make a statement for the EEOC conference. In that first conversation with Mahoney, which took about 45 minutes, she asked Jackson why he wanted the statement and he explained that he needed it for the EEOC conference. In this meeting Mahoney declined to make a statement for Jackson's submission to the EEOC.[2] Later, on that same date, Jackson again approached Ms. Mahoney requesting a statement and she again declined. This second conversation only took a "few minutes."

Two days later, on the 26th of January, 1983, Jackson again approached Ms. Mahoney requesting a statement for the rapidly approaching fact finding conference. At that time he had prepared a draft of a statement for Ms. Mahoney to review. In making this request of Ms. Mahoney he stated:

> "Will you please read this over and you can make any revisions that you think might be necessary, and then I can have it typed for your signature." (Mahoney's Testimony, App. A, A14)

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1. Following Jackson's dismissal it was discovered that Ms. Kuhn had been embezzling hospital funds during her employment.

2. Mahoney testified that she held a personal dislike for petitioner Jackson.

Mahoney refused Jackson's request. Shortly thereafter she complained about Jackson's request to the hospital's assistant superintendent who requested she put her complaint in writing. In that complaint she stated "if he [Jackson] continues to pursue this matter, I feel justified in lodging a formal complaint of harassment."

On that same date Jackson was put on "administrative leave," without being given a reason, and was barred from the hospital grounds.

On the 17th of February, 1983 Jackson was issued a dismissal letter which read in part as follows:

> "For the reasons indicated herein, you are hereby notified of your dismissal from employment with St. Joseph State Hospital, effective February 28, 1983 at the close of business. This action is being taken subject to your right to show reasons why this dismissal shall not be effected. You may answer in person at my office between the hours of 8:00 a.m. and 4:30 p.m. on or before February 25, 1983 or you may present your case in writing delivered to my office on or before the same date. The specific reasons for your dismissal are your inadequacy and inefficiency in the performance of the duties of your position, in that you have willfully exhibited behavior which is disruptive to the working activities of other employees. On Monday, January 24, 1983 you approached Rhonda Mahoney at work attempting for approximately 45 minutes to get her to change the statement she made concerning an event she observed involving you and another employee on June 4, 1982. On Wednesday, January 26, 1983 you presented a handwritten memo to Ms. Mahoney, which was writ-

> ten as if in her own words and stated that her memory was unclear as to the events that transpired on June 4, 1982 and you wanted Ms. Mahoney to sign the memo. You told Ms. Mahoney you would use the statement at a future hearing. Such acts constitute harassment of an employee, and are willfully disruptive to the work activities of the employee and others."

On the 24th of February, 1983, Jackson made a response to the hospital's dismissal letter which was rejected by letter dated February 28, 1983. Thereafter Jackson filed his third EEOC complaint alleging retaliation on the part of the hospital.

Jackson filed suit on the 9th of October, 1984, following issuance by the EEOC of a Notice of Right to Sue, charging sex and retaliatory discrimination and denial of Due Process. Jackson commenced his action *Pro Se* and requested that he be appointed counsel to pursue his claims. One of his present counsels, Samuel I. McHenry, was appointed to represent Jackson.

Following a trial before the Honorable Howard F. Sachs, United States District Court Judge for the Western District of Missouri, on the 14th of November, 1986, the court reached a decision in favor of the defendants and entered its final order.[3] (Appendix B)

Following an appeal to the Eighth Circuit Court of Appeals on the 1st day of March, 1988, that court entered its decision affirming the District Court's decision. (Appendix A) Petitioner thereafter petitioned the 8th Cir-

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3. Petitioner's due process claim is not a subject of this Petition for Writ of Certiorari nor is his claim that his discharge was based upon his sex.

cuit for rehearing en banc. That petition was denied on the 23rd of May, 1988.[4]

REASON FOR GRANTING THE WRIT

The Eighth Circuit Decision That Petitioner Failed to Establish a Prima Facie Case of Employment Discrimination by Retaliation Undermines the Protection From Retaliation Needed by Complainants in Title VII Proceedings.

The Decision in Question here by the Eighth Circuit has taken the protection from retaliation guaranteed by Title VII and treated it as if the guarantee is applicable only when the employer subjectively decides it applies. Protection from retaliation is too important within the scheme of combatting discrimination in the work place to be left to the employer's discretion to decide what is acceptable participation in Title VII proceedings.

Recognizing the importance of eradicating discrimination in the work place the United States government established Title VII, 42 U.S.C. § 2000 et seq. However, in doing so it was understood that the goal of eliminating employment discrimination would be made exceptionally difficult, if not impossible, if employees seeking redress for suspected discrimination could be legally subjected to discipline or discharge by their employer for asserting their rights. Thus, 42 U.S.C. § 2000e-3 was included in Title VII to provide protection for those complaining employees.

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4. The Honorable Theodore McMillian, Circuit Judge, filed a dissent to the Appeals Court's decision on the question of retaliation and would have granted rehearing.

An important element of that protection is what has been called the "participation" clause. Essentially the purpose of that clause is to protect employees who address and attack discrimination in employment by taking actions, *beyond* the simple filing of a complaint with the EEOC. *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

A wide range of cases have addressed the question of what constitutes protected participatory activity by an employee pursuing charges of discrimination, with various resulting decisions. Among those cases the following seem to represent the range of thought important in this case:

In *Pettway v. American Cast Iron Pipe Company*, 411 F.2d 998 (5th Cir. 1969) the court found retaliation where an employee was discharged for having made false statements about bribery in his complaint of discrimination. The court rationalized that an employee-complainant would be in a "precarious status" if the employer was free to discipline an employee merely because the employer determined that the content of the complaint was unacceptable; and that this was particularly true where the employee is usually unassisted by counsel and up against an employer generally much more powerful and sophisticated.

In *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978), where an employee in the course of processing his complaint of discrimination violated an internal rule relating to what was called an "anti-politicking" policy and was discharged, the court determined that the participation clause found in Title VII meant that the elimination of discrimination, which could only be accomplished from hearing the complaints of em-

ployees who believed that they were so victimized, was more important than an employer's internal regulations, since the employer could show no actual damage to its operations as a result of the complainant's actions.

Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980) found that an employee, who in the course of making his complaints about discrimination revealed his participation in certain illegal activity and was discharged allegedly because of those admissions, was a victim of retaliation because those admissions and subsequent discharge were "inextricably related" to his complaint.

In *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984) a black nursing employee was fired after complaining of personal mistreatment (allegedly due to her race) and of the general mistreatment of black patients. After deciding that she had gone "too far" in her activities and "general deportment" the trial court determined she could not prevail on her retaliation claim because the actions she took in opposition to the hospital's policies were "unreasonable." On appeal the Ninth Circuit reversed that decision finding that those activities (participating in a press conference, taking personal calls relating to her charges during working hours and failing to cooperate with internal efforts to address the complaints of discrimination) did not remove her Title VII protection.

On the other hand the two cases cited by the court herein as precedent for its decision found that the employee's actions were unprotected activity, *EEOC v. Shoney's, Inc.*, 536 F.Supp. 875 (N.D. Ala. 1982) and *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir. 1976).

In *EEOC v. Shoney's,* an employee was discharged after pursuing an EEOC complaint for three days without attending to his job duties during that entire period. In *Garrett* the employee pursued his discrimination complaint by refusing direct orders, leaving her work station and barging in on the meetings of managerial personnel. While the ultimate decision in these two cases differs from the ones in the previous cases cited in this petition, these cases, like others, share an understanding that in order for a complaining employee to be legitimately discharged his actions must be *objectively* judged, or as stated in *St. John v. Employment Development Department,* 642 F.2d 273 (9th Cir. 1981), the actions which the employer alleges to be the basis for the discipline must "independently [provide] support for the employer's action." In *St. John* the court determined that merely because the employee may have been "caught up" in her complaint the employer still was not free to base employment decisions affecting the employee upon the employer's subjective evaluation of how she should have pursued her discrimination complaints.

At its core the decision herein is in conflict with the level of protection afforded in each of the previously cited decisions in that the decision before this court for review found that petitioner's protection was removed not so much by his actions as by the employer's and his co-employees' *reactions to,* or *perceptions of,* his actions.

Indeed the trial court's decision herein acknowledged that the employer may have "overreacted" (App. B, A21) when Jackson was discharged, but still upheld the discharge on a finding that even if that were the case it

would be a "personnel decision", not retaliation. Deciding what constitutes protected activity should not be reduced to a "personnel decision" by the employer.

As pointed out by the dissent in the appeals court decision, nothing approaching an objective reason for discharge was found in this case.

> Appellant concedes that an EEOC complaint does not give the employee "unlimited license" to pursue his or her claims however and whenever they desire. However, appellant's efforts herein to support his EEOC complaint fell far short of "unlimited license." (App. A, A14)
>
> Indeed, appellee's argument in support of its defense that appellant's request to Mahoney for her statement was "unreasonable" rests not upon appellant's actions but upon her reaction to his efforts. Appellee refers to Mahoney becoming "angry," "upset" and "fearful" when appellant sought a statement from her for his pending EEOC charge. Yet, nowhere in the record is there any objective evidence that might lead a reasonable employer to believe that Mahoney had just cause for being "angry," "upset" or "fearful." Mahoney's reaction to appellant's efforts to obtain from her a statement for his defense can only be explained in terms of her admitted dislike of appellant. [Vol. II, Tr. 354]. It strikes me as somewhat singular that the fact that others may have felt uncomfortable when faced with appellant's admittedly persistent efforts to gather support for his EEOC claim should strip him of his Title VII protection. (Dissenting Opinion, App. A, A15-A16)

Even the decision in question acknowledged that Jackson's actions fell far short of what had previously been termed unprotected activity but indicated that these previous decisions "do not represent the minimum degree of 'bizarreness' which must be shown before a Title VII plaintiff will be stripped of his statutory protection." (App. A, A8) This finding highlights the importance of having objective standards in this area, for without those standards the complainant's efforts to pursue his charges will be chilled with the realization that if his "conduct" becomes offensive in some unspecified, undefined way he can be discharged.

The Eighth Circuit Court decision herein, in effect, adds a new element to the prima facie case necessary to establish retaliatory discrimination. Previously, in order to establish a prima facie case essentially the plaintiff has had to produce evidence showing (1) that he engaged in a statutorily protected activity, (2) that he suffered an adverse employment action and (3) a causal connection existed between the two. *Womack, supra.* However, the decision in question changes that to a requirement that the employee engage in protected activity in a manner that his employer or co-workers don't find offensive. There is no justification for such a change and it can only result in a diminution of the employee's right to be made free of retaliation and a chilling effect upon all complaints of discrimination.

The importance of having objective standards by which to judge if a complainant has overstepped the proper bounds of conduct in pursuing his complaint cannot be overstated. Without objective standards an employee's actions in attempting to process his or her complaint be-

come subject to the type of totally arbitrary and subjective decision making that courts have justifiably found so suspect in other discrimination cases. In *United States v. N. L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973) the Appeals Court referred to subjective criteria in the hiring of black employees as a "ready mechanism for discrimination". Other courts have likewise found fault with subjective criteria used by employers against minority employees, applicants or persons who have filed discrimination charges. See *Pinkard v. Pullman-Standard, A Div. of Pullman, Inc.*, 678 F.2d 1211 (5th Cir. 1982) involving the discharge of an activist Black employee; *Harrell v. Northern Elec. Co.*, 672 F.2d 444 (5th Cir. 1982) involving racial discrimination in hiring and *Colon-Sanchez v. Marsh*, 733 F.2d 78 (10th Cir. 1984) where subjective criteria were used in denying promotions to Hispanic employees.

Without clear objective standards by which to judge if an employee's complaint associated activities are protected all complainants will be reluctant to pursue their claims vigorously with the realization by the employee that if others become "upset" with his complaint or its repercussions the employer can legitimately use those feelings as justification for discipline.

Whether courts conclude that retaliation was present or determine that the employee's actions were so outrageous that they divest him of Title VII protection, in each case that decision must be based upon the employee's actions not the reactions or feelings of others. The decision in question does not employ this protective guideline. Petitioner was discharged for (1) speaking with a subordinate and (2) attempting to persuade that employee to make a statement (of her own choosing) for

the EEOC.[5] In neither case would these actions by petitioner constitute reasonable objective reasons for discharging a supervisor who had turned around a failing department.

Unless this Court establishes the need for objective standards by which to judge alleged "misconduct" other employees attempting to prosecute complaints of discrimination will be, like Petitioner, subject to Retaliation for reasons more related to how the Employer "feels" about a complaining employee than the employee's actual conduct.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the Judgement and Opinion of the Eighth Circuit Cited herein.

Respectfully submitted,

SAMUEL I. MCHENRY
RICHARD F. HALLIBURTON
(*Counsel of Record*)
Legal Aid of Western Missouri
600 Lathrop Building
1005 Grand Avenue
Kansas City, Missouri 64106
(816) 474-6750
Attorneys for Petitioner

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5. Although the 8th Circuit's decision makes comments about other alleged misconduct by Jackson it is important to point out that there was little if any evidence on this point and the employer's letter setting forth the reason for petitioner's discharge *specified* his efforts to obtain an EEOC statement as the reason for his discharge.

APPENDIX

APPENDIX A

(Filed March 1, 1988)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-2595

Richard Jackson,
Appellant,

v.

St. Joseph State Hospital, et al.,
Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

Submitted: October 15, 1987
Filed: March 1, 1988

Before McMILLIAN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BEAM,* Chief District Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Richard Jackson appeals from an order of the district court[1] entering judgment in favor of defendants in this

*The Honorable C. Arlen Beam, United States Chief District Judge for the District of Nebraska, sitting by designation.

1. The Honorable Howard F. Sachs, United States District Judge for the Western District of Missouri.

Title VII case. The district court found that Jackson's reverse sex discrimination claim was untimely and that his retaliatory discharge and due process claims were not supported by the evidence. On appeal Jackson challenges the district court's order pertaining to retaliatory discharge and due process. We affirm.

I. BACKGROUND

In May 1975 Jackson was hired by St. Joseph State Hospital as its chief accountant to correct problems which had developed in the preparation of medicare cost reports. As early as 1977 the hospital administration began receiving complaints about Jackson and the low morale in the accounting department. Jackson's subordinates complained that he would discuss one employee's private life with other employees. One employee filed a grievance claiming that Jackson was disruptive, agitated one employee against another, and created a stressful work environment. Complaints about Jackson were also made to state legislators.

In May 1978 a meeting was held to discuss changes to be made in the accounting department. The key supervisors in the department were present, but Jackson declined to attend. Hospital superintendent Dr. Nicholas Bartulica continued to receive complaints about Jackson, so a second meeting was held in late May. Jackson preferred not to attend and stated that further complaints should be put in writing. Jackson's request was communicated to his subordinates, but no written complaints were received by the administration.

In July 1978 the accounting department was audited by the Department of Mental Health. The chief auditor

found that Jackson's managerial style was causing morale problems in the accounting department. Jackson was informed that disciplinary actions would be taken if he did not correct the problems in his department.

In October 1978 Jackson's secretary filed a grievance against him stating that he frequently discussed employees' personal lives, that he had problems communicating, and that he frequently called her into his office on Friday afternoons to criticize and demean her. At a meeting between Jackson, the secretary, and Dave Farrar, the assistant superintendent for administration, Jackson became angry and stated that he would run the secretary out of his department. As a result of Jackson's conduct Farrar informed him that if he did not change his ways he would risk losing his position as department head.

Complaints about Jackson abated until January 1982 when Roxanne Kuhn filed an internal complaint against him alleging harassment. Several months before the complaint was filed Jackson had begun inquiring into Kuhn's personal life. He told Kuhn that he did not approve of her black boyfriend and that she should not expect any promotions while the relationship continued. Also, Jackson stated that he disapproved of the fact that Kuhn's children lived with her ex-husband. Kuhn's complaint also stated that Jackson frequently touched or grabbed her.

On the same day that Kuhn filed her complaint Jackson requested that she be suspended for one day with pay for failing to complete certain reports. Dr. Bartulica met individually with Kuhn and Jackson to discuss a compromise. Kuhn agreed to withdraw her complaint subpect to reinstatement if the harassment continued and

Jackson agreed to withdraw his request for suspension after being told that the request would not be supported by the hospital administration.

On June 4, 1982 Jackson went to Kuhn's office to discuss work related matters, but she was not there. He eventually found her sitting in Rhonda Mahoney's office with her back to the door. Jackson approached Kuhn from behind and placed his hands on her shoulders and did not remove them until she stood up and left the room. On June 9 Jackson called Kuhn into his office to discuss her drinking habits.

On June 10 Kuhn filed another complaint against Jackson citing the June 4 and June 9 incidents. On July 14 Jackson was issued a reprimand and directed not to place his hands on female employees, make inquiries into or discuss employees' private lives, or counsel or discipline female employees without a witness present. In response, Jackson filed an internal complaint alleging sexual discrimination. The division director found against him on October 1, 1982 and on November 17 Jackson filed complaints with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights. Jackson was advised by the hospital administration that suspension was being considered if he did not cooperate and shortly thereafter he was suspended for three days without pay.

On January 10, 1983 Jackson was notified by the EEOC that a fact finding conference had been scheduled for January 27. In preparation for the conference, Jackson approached Rhonda Mahoney regarding the June 4 incident in her office. Jackson wanted proof that his touching of Roxanne Kuhn was not sexual in nature. During

a forty-five minute conversation Mahoney repeatedly told Jackson that she had already given a statement and that she did not think it was proper to discuss the incident further. Later that day Jackson again approached Mahoney and requested a statement. Mahoney became so upset that she left work for the remainder of the day.

On January 26, two days later, Jackson gave Mahoney a prepared statement and asked her to review it, make any changes necessary, and sign it. It stated that Mahoney did not remember what happened in her office on June 4. Mahoney refused to sign the statement and complained to Jackson's supervisor that if Jackson did not leave her alone she would lodge a formal complaint of harassment. Later that day Jackson was put on administrative leave with pay pending investigation of the incident with Mahoney.

On February 17, 1983 Jackson was issued a dismissal letter which read, in part, as follows:

> For the reasons indicated herein, you are hereby notified of your dismissal from employment with St. Joseph State Hospital, effective February 28, 1983 at the close of business. This action is being taken subject to your right to show reasons why this dismissal shall not be effected. You may answer in person at my office between the hours of 8:00 a.m. and 4:30 p.m. on or before February 25, 1983 or you may present your case in writing delivered to my office on or before the same date. The specific reasons for your dismissal are your inadequacy and inefficiency in the performance of the duties of your position, in that you have willfully exhibited behavior which is disruptive to the working activities of other

> employees. On Monday, January 24, 1983 you approached Rhonda Mahoney at work attempting for approximately 45 minutes to get her to change the statement she made concerning an event she observed involving you and another employee on June 4, 1982. On Wednesday, January 26, 1983 you presented a handwritten memo to Ms. Mahoney, which was written as if in her own words and stated that her memory was unclear as to the events that transpired on June 4, 1982 and you wanted Ms. Mahoney to sign the memo. You told Ms. Mahoney you would use the statement at a future hearing. Such acts constitute harrassment [sic] of an employee, and are willfully disruptive of the work activities of the employee and others.

Jackson's written response was rejected by the hospital and his dismissal was affirmed by the Personnel Advisory Board. He filed this lawsuit on October 9, 1984 alleging sexual discrimination, retaliatory discharge, and a due process violation. The district court found for the hospital on all three claims.

II. DISCUSSION

Title VII protects an employee pursuing an EEOC complaint from retaliatory actions by his employer. 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case of retaliatory discharge Jackson must prove that 1) he was engaged in statutorily protected activity, 2) he suffered adverse employment action, and 3) a causal connection between the two exists. *Womack v. Munson*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981).

The district court found that Jackson failed to establish a prima facie case because his conduct in pursuing a

statement from Mahoney was not protected activity as it was "bizarre." Jackson argues that the cases cited by the district court, *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir.), *cert. denied*, 429 U.S. 848 (1976), and *E.E.O.C. v. Shoney's, Inc.*, 536 F. Supp. 875 (N.D. Ala. 1982), are inapplicable because the conduct of the plaintiffs in those cases was unreasonable whereas his own conduct was reasonable.

In *Garrett* an employee pursuing an EEOC complaint refused direct orders, left her work station, and barged in on meetings of managerial personnel. In *Shoney's* an employee neglected his job for three days while pursuing an EEOC complaint. Jackson argues that the time he spent pursuing a statement is reasonable when compared to *Shoney's* and his "polite efforts" can not be compared to those in *Garrett*. This argument, however, overlooks several important facts.

First, although Jackson's own efforts did not take more than a few hours, additional work time was lost when he had his secretary typing and copying documents for him on hospital time and when he disturbed Mahoney so greatly that she left work early on January 24, 1983. Second, Jackson's pursuit of a statement can not be characterized as polite. Once Mahoney stated that she did not want to make a statement to him, Jackson should have left her alone. Mahoney had already given a statement to EEOC. Furthermore, since the EEOC has subpoena power, Jackson had other less objectionable and disruptive avenues open for obtaining Mahoney's testimony. Also, Jackson's repeated assertions to Mahoney that her memory of the June 4 incident was incorrect was entirely out of line and was aptly perceived by the dis-

trict court to be "bizarre", and was an abusive attempt to have Mahoney change her views of the incident in her office.

Further, Jackson had a long string of complaints and reprimands preceding his termination. The mere act of filing an EEOC complaint does not render illegal all subsequent disciplinary actions taken by the hospital. As the district court noted, Jackson's conduct in pursuing a statement from Mahoney was the "last straw." He was fired for pursuing a statement in a highly offensive and disruptive manner after repeated warnings that he needed to change the way in which he dealt with subordinates. To require the hospital to overlook Jackson's past simply because he filed an EEOC complaint would unduly hamper the hospital's right to make employment decisions. Likewise, it would be unreasonable to hold that while on the state payroll Jackson had a federally protected right to harass Mahoney to the point that she had to leave work. *See Hochstadt v. Worcester Foundation*, 545 F.2d 222, 230-34 (1st Cir. 1976) (plaintiffs conduct exceeded scope of protection offered by Title VII).

The dissent states that Jackson's conduct fell far short of that exhibited by the plaintiffs in *Garrett* and *Shoney's*. Whether Jackson's actions were as egregious as in these cases is, of course, subject to differing opinions. However, merely stating that *Garrett* and *Shoney's* have more compelling facts does not decide the issue whether Jackson's conduct is protected. *Garrett* and *Shoney's* do not represent the minimum degree of "bizarreness" which must be shown before a Title VII plaintiff will be stripped of his statutory protection. They are only examples of conduct which resulted in such a loss.

Title VII protection from retaliation for filing a complaint does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with his peers. The public and the state should not have to suffer waste of public funds in countenancing the arrogant and bizarre conduct exhibited by Jackson. Department heads should strive to create harmonious relationships amongst subordinates and working personnel rather than discord, personal humiliations, and chaos. Jackson's record of performance was not only inferior but atrocious in making unreasonable demands on subordinates, creating inefficiency in department operations, wasting state resources, and in his personal harassment of Mahoney. The aforementioned conduct is not protected nor should it be countenanced by the salutory purposes set forth in Title VII.

Jackson also argues that due process was violated because his termination letter indicated that the decision to terminate had already been made. All he was given was an opportunity to convince Dr. Bartulica to change his mind and rescind the termination. Jackson argues that his hearing should have preceded the decision to terminate rather than the effective date of termination.

Due process, however, does not require predecision hearings. It only requires an opportunity to be heard prior to the termination of benefits. In the present case, Jackson was given written notice of his termination on February 17, 1983. The reasons for termination were clearly set forth in this letter. Accompanying the notice were statements made by hospital employees explaining Jackson's inadequacies. And, more significantly, the no-

tice stated that Jackson's termination was not effective until February 28, 1983 and until then he would continue to receive full pay.

These facts closely resemble those in *Bignall v. North Idaho College,* 538 F.2d 243 (9th Cir. 1976), where a part-time college instructor brought suit challenging the college's decision not to renew her employment contract. Bignall argued that due process required that she be given a hearing before the decision was made not to renew her contract. The Ninth Circuit disagreed and held that "a pre-termination hearing is not a hearing held prior to any decision to terminate, * * * but rather a hearing held prior to a termination of benefits . . ." *Id.* at 246 (quoting *Chung v. Park,* 514 F.2d 382, 386 n.7 (3rd Cir.), *cert. denied,* 423 U.S. 948 (1975)). *See also Vance v. Chester County Bd. of School Trustees,* 504 F.2d 820, 824-26 (4th Cir. 1974) (due process requires hearing prior to termination of benefits rather than decision not to renew contract).

In the present case Jackson's benefits—his salary—were not terminated until February 28, 1983. From February 17 until February 28 he had the opportunity to present his case and on February 23, 1983 he made a written response to the dismissal letter. Because Jackson was given the opportunity to be heard prior to the termination of his salary, his due process rights were not violated.

III. CONCLUSION

Because we hold that Jackson established neither a prima facie case of retaliatory discharge nor a due process violation, the order of the district court entering judgment in favor of the defendants is affirmed.

McMILLIAN, Circuit Judge, concurring in part and dissenting in part.

I concur in part and respectfully dissent in part. I concur in that part of the majority's opinion which found there was no due process violation; however, I do not agree that appellant did not make out a prima facie case of retaliatory discharge.

As the majority opinion recognizes, to establish a prima facie case of retaliatory discharge appellant has to prove that (1) he was engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) a causal connection existed between the two. *Womack v. Munsen*, 619 F.2d 1292, 1296 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981). The district court found that appellant failed to establish the prima facie case because in its opinion appellant's conduct in attempting to obtain a statement from Mahoney was not protected activity as it was "bizarre." It relied heavily in reaching that conclusion upon *Garrett v. Mobil Oil Corp.*, 531 F.2d 892 (8th Cir.), *cert. denied*, 429 U.S. 848 (1976) (*Garrett*), and *E.E.O.C. v. Shoney's, Inc.*, 536 F. Supp. 875 (N.D. Ala. 1982) (*Shoney's*). The district court dealt with neither the second nor third element of a retaliatory discharge case. Consequently, it is unclear whether this was a concession as to their existence or whether the district court found that it was unnecessary for either the second or third elements to be discussed because of its disposition of the protected activity claim and its conclusion that appellant's conduct was bizarre.

There seems to be no question, at least in my opinion, that appellant's discharge grew out of his efforts to obtain a statement from Mahoney for his immediate pending

EEOC fact-finding conference. If appellant's efforts in this regard were reasonable he would be engaged in statutorily protected activity. In examining appellant's conduct in this context, the district court determined that his actions in pursuing those protected activities were so "bizarre" as to remove him from that protection.

> Turning to the timely complaint of retaliation, based on the plaintiff's conduct in January 1983, there is a strong chronological connection between the incident with Rhonda Mahoney and the pendent EEOC complaint. Ms. Mahoney's testimony is convincing, however, that she became deeply offended and even fearful when plaintiff was grossly persistent in his attempts to obtain a revised witness statement from her. There is nothing to indicate that she would have objected or that defendants would have taken adverse action if plaintiff had limited his contacts to reasonable bounds. Plaintiff had become disruptive and almost frantic in his involvement in his own controversies and grievances. The protection against retaliatory conduct must be generously enforced, but plaintiff cites no authority and I have found none that would protect conduct as bizarre as that under consideration.

Jackson v. St. Joseph's State Hospital, Civ. No. 84-6127, at 3-4 (W.D. Mo. Nov. 14, 1986).

The question then before this court is at what point does an employee/complainant's action cease to be protected under 42 U.S.C. § 2000e-3. This is a question of law, because it was this alone that in the district court's opinion negated appellant's prima facie case and persuaded the district court that appellee should prevail.

In retaliation cases the question before the court is not whether the employee's actions or complaints are wise or justified. Neither is it whether the employer had other non-retaliatory grounds on which they could have acted against the employee, unless the employer can show that these other grounds would have resulted in discharge even absent the protected conduct. *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 416 (1979). The ultimate question is, were the employer's actions related to the protected activity? Here the court found that they were and concluded as a matter of law that the prohibition against retaliation did not apply in this case because of the manner which appellant pursued those protected activities. If, and in my opinion it is, this was a conclusion of law, this court's scope of review of that decision is broad, beyond the normal "clearly erroneous" standard utilized with regard to factual questions.

Even if I were to assume for purposes of argument that the question of whether appellant's activity was protected is strictly factual, the evidence still shows that his efforts to clear himself of serious allegations of sexual harassment were not "bizarre"; and, therefore the court's finding otherwise was clearly erroneous.

Let us now determine by examining appellant's conduct if the manners and methods that he used in conducting his protected activity somehow stripped him of Title VII's protection. The district court likened appellant's conduct to that found unacceptable in *Shoney's* and *Garrett*. In *Shoney's* an employee was discharged after pursuing an EEOC complaint for three days without attending to his job duties during the entire period. In *Garrett* the employee pursued his discrimination complaint by refusing direct orders, leaving her work station and break-

ing in on a personnel managerial meeting. Appellant concedes that an EEOC complaint does not give the employee "unlimited license" to pursue his or her claims however and whenever they desire. However, appellant's efforts herein to support his EEOC complaint fell far short of "unlimited license." Neither *Shoney's* nor *Garrett* is apposite.

Appellant's total amount of time spent attempting to get a statement from Mahoney was "45 minutes" on January 24, 1983, followed by a "few minutes" later that same day and "a short period" two days later on the 26th. Timewise, appellant's efforts in no way are as egregious as the conduct in *Shoney's* where the employee spent three complete days neglecting his job. Likewise, appellant's efforts to obtain a statement from an employee, Mahoney, who admittedly disliked him, cannot be compared with the employee in *Garrett* who barged in on upper management meetings demanding confrontation. Note Mahoney's cross-examination:

> Question: I believe you said he brought this written document and he gave it to you and said you could change it as you saw fit and then sign it, is that correct?
>
> Answer: He laid it on my desk and he was standing to the side of me. I was in my chair and he was standing at the corner of my desk. He said, *will you please read this over and you can make any revisions that you think might be necessary, and then I could have it typed for your signature.*

(emphasis added). (Vol. II, Tr. 356). Query: Does Mahoney's answer describe appellant's conduct as "bizarre?" I think not.

Appellant's efforts to obtain a statement for the EEOC fact-finding conference (as the hospital was also doing during the same period) were thus reasonable. It is indeed strange that the district court found appellant's conduct "bizarre" when the witness herself in her written statement to the assistant superintendent, Mr. Farrar, did not describe it as harassment; and Farrar himself when made aware of appellant's conduct merely described it as persistent. [Vol. III, TR. 570].

Appellant's claim that his discharge by appellee violated § 704(a) of the Act, 42 U.S.C. § 2000-3(a) deserves more than a short shrift. I, too, agree in principle that an employee's conduct in gathering or attempting to gather evidence to support his charge or in defense of charges made against him may be so excessive and so deliberately calculated to inflict needless economic hardship on his employer that the employee would and should lose the protection of § 704(a). However, there is no evidence whatsoever in the present case that the employer was in any way affected or suffered any economic hardship or loss or that its business was in some way obstructed or held up so that it could not continue its everyday operations. There is no dispute that the activity complained of by appellee in reference to appellant's conduct amounts to nothing more than a few conversations over a very short span of time.

Indeed, appellee's argument in support of its defense that appellant's request to Mahoney for her statement was "unreasonable" rests not upon appellant's actions but upon her reaction to his efforts. Appellee refers to Mahoney becoming "angry," "upset" and "fearful" when appellant sought a statement from her for his pending EEOC charge. Yet, nowhere in the record is there any objective

evidence that might lead a reasonable employer to believe that Mahoney had just cause for being "angry," "upset" or "fearful." Mahoney's reaction to appellant's efforts to obtain from her a statement for his defense can only be explained in terms of her admitted dislike of appellant. [Vol. II, TR. 354]. It strikes me as somewhat singular that the fact that others may have felt uncomfortable when faced with appellant's admittedly persistent efforts to gather support for his EEOC claim should strip him of his Title VII protection.

The district court's characterization of appellant's conduct as the "last straw" puts the entire situation into sharp focus. From the employer's view point during the course of appellant's employment he had filed three complaints alleging employment discrimination with the EEOC and three internal complaints based upon disciplinary actions were taken against him by appellee. The last of the three EEOC complaints involved an allegation that his discharge was retaliatory. Under the totality of the circumstances because of the number of employment and personnel complaints and problems that appellant was presenting, understandably appellee had a right to be annoyed. Not only did appellee have a right to be annoyed, but also appellee had a right if the various allegations of misconduct were shown to be true to discharge appellant. However, appellant's persistent pursuits to vindicate his alleged EEOC complaints do not give appellee a right to retaliate against him by discharge. In other words, while appellee had a right to discharge appellant, it could not discharge him for an improper reason. As soon as appellant's third EEOC complaint was filed, immediately things began to happen and in a very short time appellant was discharged. Under these circumstances

the nexus between his filing the complaint and his discharge is obvious. Consequently, I would reverse the judgment of the district court and remand for a new trial on the retaliatory discharge claim.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

(Filed November 14, 1986)

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

No. 84-6127-CV-SJ-6

RICHARD JACKSON,
Plaintiff,

v.

ST. JOSEPH STATE HOSPITAL, et al.,
Defendants.

MEMORANDUM AND ORDER

Plaintiff is a former chief accountant and supervisor of the accounting department at the St. Joseph State Hospital, a mental health facility owned and operated by the State of Missouri. After a flurry of controversies relating to personnel relations with female subordinates (not including overt sexual advances), plaintiff was terminated in early 1983. The personnel action was affirmed by administrative procedures within the state system but unemployment compensation was allowed, after a contest over whether plaintiff was disqualified by reason of misconduct.

The federal litigation is based on claims of reverse sex discrimination, retaliation for filing of charges under Title VII (42 U.S.C. § 2000e-3(a)), and claims of a denial of due process. The retaliation claim is timely and not obviously frivolous. The claim of a due process denial

has caused some concern, primarily because the notice of a right to be heard stated that a decision to terminate had already been made, thereby raising an issue which the court now characterizes as one of prejudgment or prejudice.

The sex discrimination claims are untimely and in any event without merit. The retaliation claim will be rejected because I have become convinced that it was the manner of plaintiff's processing his Title VII claim that was the "last straw" in his employment, and not the mere fact that he had made a charge and was preparing for a hearing. The due process claim will also be rejected, although the phrasing of the notice is unfortunate. I conclude that plaintiff did receive an opportunity to be heard before his termination, and I believe it is not a violation of due process that the plaintiff's supervisor may realistically have been adversely affected by his prior knowledge of the employment history.[1]

Defendants' proposed findings 1-42, inclusive, filed August 26, 1986, are adopted by reference. Plaintiff's proposed findings 1-9, 33, 34, 35, 37 and 38 are adopted by reference. Plaintiff's other proposed findings are rejected as being immaterial or because I cannot accept their wording. A full recitation of pertinent facts would be tedious and unnecessary.

Insofar as plaintiff is contending there was sex discrimination in the events of 1982 the claim is untimely, in that plaintiff failed to file suit within 90 days of having received a right to sue letter. *Hinton v. CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975). In the alternative, I

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1. This occurs quite routinely in personnel decisions.

find no persuasive proof that there was sex discrimination. Plaintiff generally asserts that female employees were less harshly treated. The conduct in evidence was not comparable, and plaintiff's special role as a supervisor of other personnel is a distinguishing factor. A supervisor may be held to higher standards than his subordinates. The restrictions of July 14, 1982, against placing plaintiff's hands on a female employee or conducting counseling or disciplinary sessions with such employees without a witness present do not establish invidious discrimination because of sex. Plaintiff's prior conduct with women had obviously become a sensitive issue, and sex-conscious precautions were appropriate. While the unwelcome touching of Mrs. Kuhn in June 1982 is difficult to interpret and may not have been overtly sexual in nature, it is unlikely that plaintiff would have made the same physical contact with a male employee under like circumstances and it was not unsound for restrictions to have been imposed.

Turning to the timely complaint of retaliation, based on the plaintiff's conduct in January 1983, there is a strong chronological connection between the incident with Rhonda Mahoney and the pending EEOC complaint. Ms. Mahoney's testimony is convincing, however, that she became deeply offended and even fearful when plaintiff was grossly persistent in his attempts to obtain a revised witness statement from her. There is nothing to indicate that she would have objected or that defendants would have taken adverse action if plaintiff had limited his contacts to reasonable bounds. Plaintiff had become disruptive and almost frantic in his involvement in his own controversies and grievances. The protection against retaliatory conduct must be generously enforced, but plaintiff cites no authority and I have found none that would protect con-

duct as bizarre as that under consideration. *See EEOC v. Shoney's Inc.*, 536 F.Supp. 875, 878-9 (N.D. Ala. 1982) (citing *Garrett v. Mobil Oil Corp.*, 531 F.2d 892, 895-6 (8th Cir. 1976), sustaining a discharge for disruptive conduct). It is of course possible that Ms. Mahoney and defendants overreacted, in light of the past history of plaintiff's conduct, but this would be at most an injustice in a personnel decision, not a violation of plaintiff's Title VII rights.[2]

Turning to the due process issue, the trial record will reflect that my most serious concern at trial related to the form of notice sent to plaintiff. After an ex parte investigation that did not include inquiry into plaintiff's explanation of the Mahoney incident, the hospital superintendent sent plaintiff a notice on February 17, 1983, of his dismissal from employment, effective February 28, "subject to your right to show reasons why this dismissal should not be effected." This raised a question that a definitive decision might have been made prior to giving plaintiff an opportunity to be heard. I doubted that a mere deferral of deprivation (loss of wages) could justify such governmental conduct. Plaintiff concededly had a property interest in his position.

It is now concluded, however, that the due process requirement of a predeprivation hearing opportunity is to be literally construed. Judge Adams has explained, "a pre-termination hearing is not a hearing held prior to

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2. While not controlling, it may be noted that plaintiff failed to persuade the state administrative agency that there was an unjust discharge. The unemployment compensation decision was based on a different standard. Benefits are payable even though an employee has shown "lack of judgment" but not "willful misconduct." *Powell v. Dir. of Emp. Security*, 669 S.W.2d 47, 50 (Mo. App. 1984).

any decision to terminate . . . but rather a hearing held prior to a termination of benefits." *Chung v. Park*, 514 F.2d 382, 386 n. 7 (3d Cir. 1975), *cert. denied* 423 U.S. 948 (1975). *See also Swab v. Cedar Rapids Community School Dist.*, 494 F.2d 353 (8th Cir. 1974). The question should probably be recharacterized as one of prejudice or prejudgment bias.

Although it may be supposed that Dr. Bartulica may have felt he had heard about enough of plaintiff's interpersonal problems when he received word of the Mahoney incident, the text of the notice is itself not factually significant. Dr. Bartulica simply used a form approved by the Missouri Attorney General's office and incorporated in a manual distributed by the State Office of Administration. Having heard Dr. Bartulica as a witness, I am unable to conclude that he was so personally committed to discharging plaintiff, without hearing an explanation, that his role as the initial decisionmaker was constitutionally defective.

It is "very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints . . . and then to participate in the ensuing hearings." *Withrow v. Larkin*, 421 U.S. 35, 56 (1975). "We should also remember that it is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around." *Id.* at 57. The evidence does not show that Dr. Bartulica had become "so psychologically wedded" to his complaint that he would be unable to judge plaintiff's response fairly. While the choice of wording of the notice does seem unfortunate, I cannot find a violation of due process, under the authorities. *Cf. Klinge*

v. Lutheran Charities Ass'n of St. Louis, 523 F.2d 56, 63 (8th Cir. 1975); *Morris v. City of Danville*, 744 F.2d 1041, 1044-45 (4th Cir. 1984).[3]

For the foregoing reasons, judgment should be entered in favor of defendants. SO ORDERED.

/s/ Howard F. Sachs
Howard F. Sachs
United States District Judge

DATED: Nov. 14, 1986.

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3. The most problematic aspect of Dr. Bartulica's role, on reflection, was his earlier suggestion that a severance of the employment relationship might be desirable. There is often a major difference, however, between such an expression and a decision to terminate an employee involuntarily. No cases have been cited for the proposition that due process is violated when a decisionmaker has previously made such a suggestion.

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-314

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD D. JACKSON,
Petitioner,

vs.

ST. JOSEPH STATE HOSPITAL, et al.,
Respondents.

REPRINTED COPY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO WRIT

WILLIAM L. WEBSTER
Attorney General
MARY STEWART TANSEY
(*Counsel of Record*)
Assistant Attorney General
8th Floor, Broadway Building
P.O. Box 899
Jefferson City, Missouri 65102
Telephone: (314) 751-4486
MBE #30283
Attorneys for Respondents

E. L. MENDENHALL, INC., 986 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

21 pp

QUESTION PRESENTED FOR REVIEW

Whether an employee with a history of disruptive behavior in the work place whose conduct while attempting to secure a statement for EEOC from a subordinate employee disrupts the work environment for a fellow employee and seeks to pressure the co-worker into modifying or changing a previous statement against her will are acts that deprive an employee protection under the participation clause of Title VII.

LIST OF ALL PARTIES

1. Richard Jackson, Petitioner
2. St. Joseph State Hospital, Respondent
3. Dr. Nicholas Bartulica, M.D., Respondent
4. David Farrar, Respondent
5. Henry J. Colman, Respondent

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RESPONDENTS' BRIEF IN OPPOSITION TO WRIT

COUNTER STATEMENT OF CASE

The panel decision clearly sets out the historical series of incidents that resulted in the "last straw" which caused Mr. Jackson's dismissal. Jackson was hired in 1975 and by 1977 complaints by Jackson's subordinate employees were being heard by the Director of the Department of Mental Health and State legislators in Jefferson City. The employer received complaints that Jackson would discuss one employee's private life with other employees and that Jackson's managerial style was causing low morale. These complaints were substantiated by Chief Auditor of DMH during a field audit specifically requested by the Director of the Department to investigate the complaints against Jackson.

The Superintendent of St. Joseph State Hospital convened two separate meetings for employees to voice their concerns and requested Jackson to be present. Jackson declined to attend on both occasions. Jackson was informed in 1978 that disciplinary action would be taken if corrective action was not forthcoming.

In October 1978, Jackson's secretary filed a grievance against Jackson alleging that Jackson discussed employees' personal lives with her and that Jackson frequently called her into his office on Friday to demean and criticize her. Jackson's supervisor called a meeting between Jackson and his secretary. Jackson hit his fist on a piece of furniture during the meeting and stated he would run the secretary out of the Department. Jackson was informed that if he did not change his ways he would be removed as a Department head.

In January of 1982, another employee (Kuhn) under Jackson filed a complaint against Jackson. Jackson told this white female employee (Kuhn) that he did not approve of her black boyfriend and that no promotion would be forthcoming while the relationship continued. Jackson also told this employee that her children living with her ex-husband was unacceptable. The employee also complained that Jackson frequently touched or grabbed her. On the same day this employee filed a grievance Jackson requested this employee be suspended for one day with pay for failure to complete work reports. Superintendent Bartulica talked to Jackson and the employee and successfully obtained their consent to withdraw the grievance and disciplinary request.

On June 4, 1982, Jackson went to Mahoney's office to find employee Kuhn. Jackson approached Kuhn from

behind put his left hand on her right shoulder walked around in front of Kuhn and did not remove his hand until Kuhn moved away and stood up. Kuhn made an attempt to move to get away from Jackson while she was seated. On June 10, 1982 Jackson called Kuhn into his office to say she was "glowing" and wanted to discuss her drinking with her. Kuhn left his office. Kuhn filed a grievance alleging harassment regarding the incidents of June 4 and 9.

On June 14, 1982 the Superintendent, Jackson's Supervisor, and the Personnel Officer talked with Jackson about the severe lack of judgment and tact in addressing Kuhn on June 4 and June 9. Jackson gave three different versions of the incident of June 4 and denied all the allegations. Dr. Bartulica reprimanded Jackson and requested his resignation which Jackson refused to tender.

The written reprimand outlined his previous deficiencies and put Jackson on notice that he should not place his hands on female employees, cease inquiries into private lives of his employees, cease gossiping about private lives of employees, and conduct all counseling with female employees in the presence of a witness. The requirement of a witness to counseling of female employees was to protect the facility and Jackson from future complaints of sexual harassment.

On July 30, 1982 Jackson filed an internal complaint alleging sexual harassment. The Division's Director found no probable cause and dismissed the complaint on October 1, 1982.

On November 8, 1982 Jackson issued a written counseling to Kuhn accusing her of lying and ordering her

to stop fidgeting, prolonged scratching, and walking off leaving him talking to himself. Jackson also verbally counseled Kuhn on this date with no witness present in the room.

On November 18, 1982 Jackson was apprised by his supervisor that he would be recommending a suspension for Jackson. After being advised of the recommendation, Jackson stated he filed an EEOC complaint the previous day. On November 24, Superintendent Bartulica presented the suspension letter to Jackson. Jackson was suspended without pay from December 1 through December 3, 1982.

Jackson filed a second EEOC complaint on December 13, 1982, alleging that his suspension was retaliatory.

On January 24, Ms. Mahoney testified to the facts as follows:

> Q. I would like to bring your attention to the latter part of January, specifically January 24, 1983, and did you have a meeting with Mr. Jackson that day?
>
> A. Yes, I did.
>
> Q. Will you tell us what happened?
>
> A. I was called into his office, and something to the effect that he had been advised that he was allowed to call witnesses to an EEOC hearing that was going to be scheduled, I believe it was sometime later that month.
>
> Q. Do you recall what time this was when the discussion started?
>
> A. It was about 8:15 in the morning.

Q. Okay.

A. Rather than having me attend, he didn't think that was necessary, that a statement from me could be taken by him to this session. I informed him I had already made a statement. This was in regard to the events that occurred in my office with Mrs. Kuhn in June. I informed him I had already given a statement and it was my understanding that EEOC had that statement and that if there was any clarification needed or any other information that was needed by them, that I felt a member of EEOC would be contacting me, or if he had an attorney, that his attorney should be contacting me. I didn't think it was proper for me to discuss it with him. I had already given a statement that was sufficient. *And he wanted to know whether or not I could have misunderstood the action that I had perceived Mrs. Kuhn making as pulling away from his hand, could it have been possible that she was reaching to retrieve some folders that she had on her lap?* I repeated that I had given a statement as to what I had seen, my honest recollection of what had taken place, and, no, I didn't know if that was true.

That is not what I had seen. It was repeating the same questions several times, my answering that I didn't wish to make another statement unless it was requested by a member of EEOC or by his attorney, someone other than himself, in other words. Finally, he accepted that.

Q. How long did this discussion last?

A. Approximately 45 minutes.

Q. Were there other topics discussed during that 45 minute period?

A. That was the topic of conversation, totally.

Q. Did he ask you several times?

A. Yes.

Q. What happened next?

A. I went back to my office and it wasn't very much longer, he came into my office and again asked if I would make a statement, *that my memory might not have been clear,* that she could have been retrieving some folders, and that was the motion I had seen, and I again repeated the same thing, that that is not what I saw.

Q. What was your reaction to all of this?

A. I was angry. I was upset, because I had said in no uncertain terms and phrased it very clearly that I didn't wish to make a statement. He wasn't accepting my refusal.

Q. What was his response?

A. I finally left the office that day.

Q. What happened next?

A. On Wednesday, the 26th of January, he came into my office and he had a yellow legal tablet and on this, it may have just been one page, but that type of paper, and there was a statement written as though I had written it, as though it were coming from me.

Q. Do you remember how many pages it was?

A. I believe it was just the one page. I can't remember clearly whether it was more than that. It wasn't more that two, I am sure. *It was more or less saying what he had asked me to make a statement in regard to that my memory was a little unclear to the events that had actually taken place that day, and in thinking about the matter, that she possibly was reaching to retrieve these folders and I wanted to clarify that, something to that effect.* I told him that I was not going to sign the statement. He was asking me to read it over. I could change the wording if I wished, but he would like me to read it over and he would have it typed up for my signature with any revisions that I would like to make.

I told him I was not going to sign it, I was not giving him a statement, and if I had told him prior that any more information was needed, if I was asked to testify by the EEOC I would be there. If I were asked to give any more information as to a statement from them, I would gladly give it, but I didn't think it was proper for him to be asking me for information. It should come from another source.

Q. Did you tell him, "I have already told you that"?

A. Yes.

Q. What was his reaction to that?

A. As though the conversation on Monday had not taken place, any of the conversation had not taken place.

Q. What was your reaction?

A. I was extremely upset.

Q. Will you describe that?

A. I was a little fearful because I had said no several times, and it didn't seem to be accepted. This was unbelievable that after the conversation that we had on Monday, when I expressed by position to him so clearly, that he would have written this and again asked me for a statement. I didn't want to work under those conditions any longer.

Q. What did you do?

A. I contacted Mr. Farrar and I went down and talked to him. I told him what had taken place on Monday and again that morning.

Q. What kind of emotional state were you in?

A. Well, I wasn't capable of performing any of my duties, that is for sure. I was just terribly upset. I didn't wish to continue to work with the possibility that that type of situation would come up again, that I would constantly be asked the same question over and over again, when I made my position very clear.

On January 26, 1983 Jackson was put on leave with pay pending an investigation of the incidents of January 24 and 26. On February 17, Jackson received a dismissal letter reciting the historical progression of disciplinary actions. Moreover Jackson was put on notice that the proposed action of dismissal was based on his attempt to get the employee to change a previous statement and exhibiting behavior that was disruptive to work activities of the employee and others. Jackson was given until February 25, 1983 to show cause why the dismissal should not be effected. Jackson's written response was rejected, he appealed his dismissal to the Personnel Advisory Board which affirmed the dismissal.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The Eighth Circuit Court of Appeals correctly determined that plaintiff-petitioner failed to present a *prima facie* case of retaliatory discharge under Title VII in that petitioner's conduct in pursuing a statement for EEOC was highly offensive and disruptive particularly after petitioner had received several warnings to change the way he dealt with subordinates. Moreover, the Eighth Circuit opinion does not espouse a "subjective standard" for determining whether conduct is protected under Title VII nor is the decision at odds with previous Circuit Court opinions holding that conduct to be protected under Title VII must be reasonable, applying a balancing test to the factual determination of whether the conduct is protected.

A.

Petitioner seeks a writ of certiorari from this Court based upon the argument that the Eighth Circuit decision in this matter applies a "subjective standard" in its determination that the petitioner's conduct exceeded the scope of protection offered by Title VII. Petitioner claims the Eighth Circuit removed petitioner's protection not so much by his actions as by the employer's and his co-employees' reactions to, or perceptions of, his actions.

In *Hochstadt v. Worcester Foundation For Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976), the First Circuit held that courts must balance the purpose of Title VII to protect persons engaging reasonably in activities opposing (or participating in the processing of a complaint) in discrimination, against Congress' equally manifest desire not to tie the hands of employers in the

objective selection and control of personnel [See also *Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984); *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1015 (9th Cir. 1983); and *Francoeur v. Corroon & Black Co.*, 552 F. Supp. 403, 412 (S.D. N.Y. 1982)]. It is clear that not all opposition or participation activity is protected under Title VII. The manner of the employee's conduct must be reasonable as determined by a case-by-case basis keeping in mind the purposes of Title VII discussed above. *Hochstadt v. Worcester Foundation, Inc.*, 545 F.2d 222, *supra* at 231.

The First Circuit continued in its reasoning in *Hochstadt, supra* at 231, that allowing an employee to invoke the protection of Title VII for conduct aimed at achieving purely ulterior objectives, or for conduct aimed at achieving even proper objectives through the use of improper means, could have an effect directly contrary to Congress' goal, by discouraging employers from hiring persons whom the Act is designed to protect. Further, the First Circuit set out a balancing standard the courts and the employer must use in each case to determine whether the conduct of an employee who is opposing discrimination or participating in processing a complaint of discrimination is protected under Title VII. The First Circuit sets out the following:

> The standard can be little more definitive than the rule of reason applied by a judge or other tribunal to given facts. The requirements of the job and the tolerable limits of conduct in a particular setting must be explored.

Circuit Courts have recognized and do apply a balancing test to determine if opposition or participation

conduct is protected under Title VII. In *Rosser v. Laborers' International Union of North America,* 616 F.2d 221, 223-24 (5th Cir. 1980), *cert. denied,* 449 U.S. 886, 101 S. Ct. 241, 66 L. Ed.2d 112 (1980), an employee's hostility to a supervisor rendered her ineffective in the performance of her duties and therefore her conduct was not protected. Also, the Fifth Circuit in *Jefferies v. Harris Co. Comm. Action Association,* 615 F.2d 1025, 1036 (5th Cir. 1980), an employee's surreptitious copying of confidential documents interfered with the employer's interest in maintaining confidentiality of employment records. In *Ammons v. Zia Company,* 448 F.2d 117 (10th Cir. 1971) the Tenth Circuit found an employee with a history of poor work performance constantly complained about her pay and that the employer discharged the employee for a series of incidents not relating to discrimination. Moreover, the Ninth Circuit in *Silver v. KCA, Inc.,* 586 F.2d 138, 141 (9th Cir. 1978), recognizes that not all acts by an employee in participation of an employment discrimination complaint or opposition to discrimination is protected under Title VII. The means of opposition or participation must be reasonable in light of the employer's interest in maintaining a harmonious and efficient operation. *Id.* Furthermore, the Ninth Circuit in *Ruggles v. California Polytechnic State University,* 797 F.2d 782, 786-87 (9th Cir. 1986), holds that engaging in protected activity or conduct should not put the employee in a better position than she would be otherwise.

Thus the Circuit Courts have adopted a balancing standard based upon a rule of reason comparable to a fact finding by a judge to determine on a case-by-case basis whether participation or opposition conduct is protected under Title VII. This balancing standard was

used by the Eighth Circuit in the case at bar. The Eighth Circuit is not clearly erroneous in its finding that the conduct of petitioner herein was not protected in that the Act does not clothe the complainant with immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct in dealing with subordinates and with peers (App. A to Petitioner's Petition at A9). The Circuit Court judged petitioner's conduct in light of employer's and employee's interests and found that petitioner's conduct was not protected. The Eighth Circuit made a finding of fact based upon objective standards and there is no indication any subjective measure was applied.

B.

The Circuit Court's decision herein is consistent with the cases cited by petitioner in his petition for Writ of Certiorari. Petitioner claims the level of protection granted in the cases cited in his petition are in conflict with the Eighth Circuit opinion herein in that the Eighth Circuit denied protected status to petitioner's conduct based upon the employer's and co-worker's reaction or perceptions of petitioner's conduct.

In support of this claim of error, petitioner states the trial court herein acknowledged that the employer may have "overreacted" when petitioner was discharged, but still upheld the decision on a finding that even if that were the case it would be a "personnel decision", not retaliation. Petitioner complains that protected activity should not be reduced to a personnel decision by the employer. However, the district court was clearly stating that there was no evidence to indicate that the co-worker or the employer would have taken adverse

action if plaintiff had limited his contacts to reasonable grounds (App. A, A20). Hence no evidence was found to hold that the processing of the EEOC statement, *per se,* played any part in the dismissal. The manner in which petitioner conducted himself coupled with his long history of disruptive behavior resulted in his termination. Title VII prohibits retaliation for protected activity but is not a shield against harsh treatment at the work place not found to be retaliatory. *McCollum v. Bolger,* 794 F.2d 602, 610 (11th Cir. 1986).

Again, petitioner claims the cases he cites are in conflict with the Eighth Circuit opinion herein. Respondents maintain that the courts in the cases cited applied a balancing test in each case and struck the balance in favor of the employee or the employer after application of the interests involved. For example, in *Pettway v. American Cast Iron Pipe Company,* 411 F.2d 998 (5th Cir. 1969) the Circuit Court found that the EEOC complaint contained malicious material against the employer, but that the strict rules of confidentiality of the complaint and penalty for disclosure protected the employer from any injury or damage and therefore the interests of the employer were protected and the court found for the employee. In *Sias v. City Demonstration Agency,* 588 F.2d 692 (9th Cir. 1978) an employee wrote a letter to HUD complaining about deficiency in number of Mexican-Americans employed at his work, the court found the employee was discharged because he wrote the letter and there was no evidence that his activity was disruptive to the work environment. The court concluded the employee's activities were reasonable.

Petitioner also cites *Womack v. Munson,* 619 F.2d 1292 (8th Cir. 1980) and argues that the case at bar is

in conflict with the level of protection granted in *Womack*. The Eighth Circuit found that there was no independent basis for the dismissal other than the content of the complaint. Because the reason for the dismissal was inextricably related to the allegation in the complaint, the discharge was retaliatory. The issue in *Womack* was whether there was a reason for the dismissal separate from the complaint; the court answered "no." Unlike the case at bar, petitioner was discharged for his disruptive conduct, i.e., attempting to have a co-worker modify an earlier statement against her will and causing disruption in the work place.

In *Wrighten v. Metropolitan Hospitals, Inc.*, 726 F.2d 1346 (9th Cir. 1984), the court found that a black nurse's complaints about patient care did not disrupt the work environment and were reasonable. However, the court did state that there may be situations where the employee's activity coupled with conduct of a disruptive nature can exceed statutory protection. *Wrighten, supra* at 1355-1356. Thus, the above-referenced cases are not inconsistent with the Eighth Circuit case at bar in that all cases employed a balancing test to ascertain if the conduct of the employee was protected conduct.

CONCLUSION

This Court should deny the request for Writ of Certiorari in that the Eighth Circuit case challenged in this matter applies the well-established balancing test to determine whether the conduct of the employee has exceeded reasonable grounds and thereby fails to be protected activity. Moreover the Eighth Circuit decision adequately protects the interests of the employee and employer in retaliation claims. Therefore, this Court should deny the request for a Writ of Certiorari.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General
MARY STEWART TANSEY
(Counsel of Record)
Assistant Attorney General
Missouri Bar No. 30283
8th Floor, Broadway Building
Post Office Box 899
Jefferson City, Missouri 65102
Phone: (314) 751-4486
Attorneys for Respondents

STATE OF MISSOURI)
) ss.
COUNTY OF COLE)

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 28.2, I, MARY STEWART TANSEY, a member of the bar of this Court, do hereby certify, under oath, that copies of the Brief in Opposition filed by Respondents in the matter of *Richard D. Jackson v. St. Joseph State Hospital, et al.*, No. 88-314 were deposited in the United States Post Office, first-class postage affixed, on September 23, 1988, and addressed to:

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Joseph F. Spaniol, Jr.
Clerk
The Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

3 copies

Samuel I. McHenry
Rich F. Halliburton
Legal Aid of Western Missouri
600 Lathrop Building
1005 Grand Avenue
Kansas City, Missouri 64106

MARY STEWART TANSEY